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D. L. Appellant/Claimant, v. Charity Organization Appellee/Employer.	Case No.: ES-P-07-107473

FINAL ORDER

I. INTRODUCTION

This is an appeal by Claimant of a Claims Examiner's Determination certified as served on May 23, 2007. The appeal raises the issue whether Claimant voluntarily left her most recent work without good cause connected with her work, as specified in 7 District of Columbia Municipal Regulations ("DCMR") 311, and the District of Columbia Unemployment Compensation Act (D.C. Code, 2001 Ed. § 51-110(a)).

This administrative court issued a Scheduling Order and Notice of In-Person Hearing on June 28, 2007, scheduling the hearing for July 12, 2007. However, on motion of the Claimant and for good cause shown, the hearing was rescheduled to July 24, 2007, at 1:30 p.m. Appellee/ Employer (hereinafter "Charity Organization," or "CO") was represented by Chief Operating Officer I. H., who testified on CO's behalf. Claimant represented herself and testified on her own behalf. S. S., Administrative Assistant for the Field Department at CO, and D. S. J., Senior Manager of the Field Department at CO also testified for Claimant. During the hearing, I

admitted Claimant's exhibits 100-104 and CO's exhibits 200-203 into evidence. I also relied on court records marked for identification purposes as 300 and 301 to assess jurisdiction.

II. FINDINGS OF FACT

1. On June 1, 2007, Claimant filed an appeal of the Claims Examiner's May 23, 2007, Determination.[1]

2. Claimant was employed at the CO, an advocacy organization, from November 18, 2002, until March 15, 2007. When she left CO, Claimant was the Program Coordinator of the Field Department. Claimant was supervised by S. F. W. I. H, Chief Operating Officer, supervised S. F. W. Mr. H. has worked for CO for approximately two years. S. F. W. has worked for CO for a considerable number of years longer than Mr. H.

3. When Mr. H. started with the CO, he was told that a major problem he had to address was the lack of comprehensive, consistently applied personnel policies. One aspect of the problem that Mr. H. quickly identified was the fact that employees who CO believed were covered by the federal Fair Labor Standards Act ("FLSA") and entitled to overtime pay for all hours worked over forty hours in a work week were receiving compensatory time off in lieu of the mandated time and one-half overtime pay. *See* exhibit 104. Mr. H. set out to change this and other policy flaws in the CO personnel system. During 2004 (the only year for which data was submitted), Claimant earned forty hours of compensatory time off. Exhibit 100.

4. On July 20, 2006, Claimant sought approval to work three days per week with a reduced number of total hours worked (thirty). Exhibit 202. This request was approved by the

[1] Nothing in the record below indicates any issue has been raised or preserved concerning factors under D.C. Code, 2001 Ed. § 51-109; *e.g.*, base period eligibility, availability for work.

managers at CO for the period of August 1, 2006, through October 31, 2006. Exhibit 203. However, by agreement of everyone involved, Claimant's work schedule was extended to March 1, 2007. During this period, Claimant's work load was reduced to reflect her part-time status.

5. The deadline for the compressed work week for Claimant was set at March 1, 2007, because that was when CO formally instituted its new personnel manual. Prior to this point, CO had decided that Claimant's three-day, thirty-hour work week had to change because it neither comported with its new personnel policies, nor was the schedule in the organization's best interest. One component of the new personnel rules was an organizational dictate that employees who were exempt from FLSA, even those working part-time, were expected to work whatever hours were necessary to ensure that the organization's needs were met.

6. In February 2007, prior to implementation of the new personnel rules, CO distributed a draft of its manual for employees to review and comment on. It was during this same time that Claimant also learned that her three-day, thirty-hour work week would not be extended beyond March 1, 2007. Claimant and CO began discussions to determine if an agreement regarding her work schedule could be reached. CO informed Claimant that it preferred she work full-time but was willing to allow her to work part-time, so long as she was in the office every day of the work week and completed all of her work, regardless of how many hours would be required to complete her assignments. It was also during this period that Claimant learned that she would no longer be given compensatory time off for the hours she worked in excess of her scheduled hours in any given work week.

7. This change was significant for Claimant, because even though CO never accepted Claimant's repeated assertions over many years that she was covered by the FLSA, it had always

given her compensatory time off. Claimant determined, and CO concurred, that if she worked part-time, but was considered exempt from FLSA by CO, pursuant to the new personnel policy she would be expected to work in excess of forty hours per week (depending on work flow), but receive less than her former full-time compensation. Claimant believed that this would amount to a substantial pay cut for her, and even though she felt working part-time was in her best interest (given her personal situation), she could not consent to the offered part-time work arrangement. CO currently has one employee who is considered part-time under CO's employment policy and is considered exempt from FLSA by CO. She works an average of forty hours per week.

8. CO sponsors at least two major events every year. These are the "Team Leader Training" program and the "Advocacy Conference." In the past, the Team Leader Training program was multiple days long; however, in 2007, it was reduced to one day. CO has had financial problems and it, at least in part, addressed these problems by not filling staff vacancies. This decision, in turn, added pressure on existing staff, because the work of the organization did not diminish with the size of the staff. Historically, staff has worked significant extra hours to prepare for and manage the Team Leader Training program and Advocacy Conference. It was common for staff to be at the office until 10:30 p.m. during these periods.

9. CO and Claimant were unable to reach agreement on a work schedule for Claimant. CO was unwilling to allow Claimant to work less than five days per week (even if she worked part-time), or compensate Claimant for overtime by either paying her time and one-half or giving her compensatory time off (as Claimant had received in the past). On March 6, 2007, Claimant announced her resignation effective March 15, 2007.

III. CONCLUSIONS OF LAW AND DISCUSSION

In accordance with D.C. Code, 2001 Ed. § 51-111(b), any party may file an appeal from a Claims Examiner's Determination within ten calendar days after the mailing of the Determination to the party's last-known address or, in the absence of such mailing, within ten (10) calendar days of actual delivery of the Determination. The Determination in this case was certified as having been served on May 23, 2007. Claimant filed her appeal request with this administrative court on June 1, 2007. The appeal was timely filed and jurisdiction is established. D.C. Code, 2001 Ed. § 51-111(b).

In this jurisdiction, generally any unemployed individual who meets certain statutory eligibility requirements is qualified to receive benefits. D.C. Code, 2001 Ed. § 51-109. The law, however, creates disqualification exceptions to the general rule of eligibility. If an employee voluntarily leaves her most recent work without good cause connected with the work, the employee is disqualified from receiving benefits. D.C. Code, 2001 Ed. § 51-110. The burden is upon the employer to show that the employee voluntarily left work. OAH Rule 2820.3 (burden of production on party arguing an exception to a statutory requirement); *Green v. D.C. Dep't of Employment Servs*., 499 A.2d 870, 876 (D.C. 1985). Thus, under current law, "[l]eaving is presumed to be involuntary unless the claimant admits (or the employer establishes) that it was voluntary. . . . The test of voluntariness is whether it appears from all of the circumstances that an employee's departure was 'voluntary in fact, within the ordinary meaning of the word voluntary.'" *Cruz v. D.C. Dep't of Employment Servs*., 633 A.2d 66, 69-70 (D.C. 1993) (internal citations omitted). An employee may offer testimony or documents confirming that she voluntarily quit. Such testimony, if credited, can be sufficient to satisfy the employer's burden of production and, perhaps, persuasion.

If it is established that an employee's departure is voluntary, that employee may still be eligible for unemployment compensation benefits if she can demonstrate "good cause connected with the work" for leaving. 7 DCMR 311.4. The determination of "good cause connected with the work" "is factual in nature, and turns on what 'a reasonable and prudent person in the labor market' would do under similar circumstances." *Cruz,* 633 A.2d at 70 (quoting 7 DCMR 311.5).

Thus, the question before this administrative court is whether Claimant voluntarily quit and if so, whether she had good cause connected with her work. Claimant acknowledges that she voluntarily quit her job. She was neither forced out, nor was she asked to leave. Therefore, this administrative court concludes that Claimant's decision to leave her job was voluntary within the meaning of the governing regulations. 7 DCMR 311.

The remaining question is whether Claimant had good cause connected with the work for voluntary leaving. *See* 7 DCMR 311.6 – 311.7; D.C. Code, 2001 Ed. § 51-110. The regulations recognize good cause as including "failure to provide remuneration for employee services." Reasons that are not good cause include a "minor reduction in wages." There is no case law in this jurisdiction addressing the question of how much of a reduction in wages is "substantial" enough to constitute good cause for leaving a job, but cases from other jurisdictions are instructive. Claimants have good cause to voluntarily quit when they suffer a "substantial" reduction in wages. *Couch v. N.C. Employment Sec. Comm'n*, 366 S.E.2d 574, 577 (N.C. Ct. App. 1988) ("The majority rule among those states which have addressed this specific issue is that a substantial reduction in pay or hours worked may be good cause attributable to the employer so that the claimant is not disqualified as a matter of law from receiving unemployment benefits."). While there is no clear percentage figure that separates a minor reduction in wages from a substantial one, some courts will grant unemployment compensation

benefits if claimants, through no fault of their own, suffer at least a 20% reduction in wages. *See Griffith Chevrolet-Olds, Inc. v. Unemployment Comp. Bd.of Review*, 597 A.2d 215, 218 n.3 (Pa. Commw. Ct. 1991) (no cases in Pennsylvania have awarded unemployment compensation benefits unless there was at least a 20% reduction in wages); *Johnson v. Walch & Walch, Inc.*, 696 N.W.2d 799, 801 (Minn. Ct. App. 2005) (Minnesota courts have held that a 19% to 25% reduction in wages constitutes a good cause for an employee to voluntarily quit).

In the instant case there is no dispute that prior to March 2007, when Claimant worked full-time she earned compensatory time off for hours that she worked in excess of forty during any given work week. Further, when Claimant worked part-time, she was not expected to work more than her scheduled work hours. There is also no dispute that during calendar year 2004, Claimant earned forty hours of compensatory time off. Exhibit 100. However, Claimant presented no evidence that allows me to calculate how much uncompensated time she reasonably could be expected to face if she assented to CO's conclusion that she would not be compensated for overtime (whether Claimant worked full- or part-time). For that matter, even though the obligation to establish the factual predicate for a good cause determination is Claimant's, CO did not present any evidence that allows me to assess the reduction in wages associated with its decision that Claimant would not be compensated for overtime.

I conclude that Claimant has failed to establish by a preponderance of evidence that the reduction in wages imposed by CO was a substantial reduction in wages and constitutes good cause connected with the work for her to voluntarily quit her work. *See Armco Steel Corp. v. Labor & Indus. Rel. Comm'n*, 553 S.W.2d 506 (Mo. App. 1977) (demotion and resulting pay reduction of 44% gave claimant good cause to leave.). However, I realize that Claimant is not an attorney and probably did not know with precision her burden of proof (though given the

evidence presented she at least intuitively understood that she had to prove that she was facing a reduction in wages); particularly since this burden of proof is not set forth in the governing statute, regulations or an opinion of the District of Columbia Court of Appeals. Therefore, I will provide the parties an opportunity to supplement the record with such evidence, by staying this Final Order for fourteen days from the date of service. Prior to expiration of that fourteen day period, the parties shall be allowed to supplement the record by submitting documents (e.g. time or attendance records) evidence answering the question: to what extent, if any, did CO's determination that Claimant would not be compensated for time worked beyond her scheduled hours amount to a reduction in wages? The parties must send each other a copy of any documents submitted to this administrative court. If either party believes that a hearing should be scheduled to take additional testimony they shall set forth their request and analysis in writing within the same fourteen day period.

The Claims Examiner's Determination is hereby affirmed and Appellant/Claimant remains ineligible for unemployment benefits.

II. ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is, this 3rd day of August 2007

ORDERED that the Claims Examiner's Determination that Appellant/Claimant D. L. is ineligible for benefits is **AFFIRMED;** it is further

ORDERED that Appellant/Claimant D. L. remains **INELIGIBLE** for unemployment benefits; it is further

ORDERED that this Final Order is **STAYED** for fourteen days from the date that it was served on the parties; it is further

ORDERED that during this fourteen day period, the parties may supplement the record on the question set forth above; it is further

ORDERED that the appeal rights of any person aggrieved by this Order are stated below.

August 3, 2007

/S/
Jesse P. Goode
Administrative Law Judge